No. 15-7

In The Supreme Court of the United States

UNIVERSAL HEALTH SERVICES, INC.,

Petitioner,

v.

UNITED STATES and COMMONWEALTH OF MASSACHUSETTS ex rel. JULIO ESCOBAR and CARMEN CORREA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE COALITION FOR GOVERNMENT PROCUREMENT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the "implied certification" theory of legal falsity under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq.*, is viable.

2. If the "implied certification" theory is viable, whether a government contractor's reimbursement claim can be legally false under that theory if the provider failed to comply with a statute, regulation, or contractual provision that does not state that it is a condition of payment; or whether liability for a legally false reimbursement claim requires that the statute, regulation, or contractual provision *expressly* state that it is a condition of payment.

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INTEREST OF *AMICUS CURIAE*[1]

The Coalition for Government Procurement (the "Coalition") is a nonprofit, nonpartisan organization. Its membership consists of small, medium, and large business concerns selling commercial products and services to the federal government. The Coalition has over 200 member companies covering a wide variety of industries. The Coalition's members collectively account for a significant percentage of the sales generated through General Services Administration ("GSA") and Department of Veterans Affairs ("VA") contracts, including those awarded through the Multiple Award Schedules ("MAS") program. All federal agencies are free to use MAS contracts to purchase commercial products and services. The GSA website boasts that GSA MAS contracts alone are responsible for $50 billion in annual spending, representing approximately 10 percent of overall federal spending. Coalition members are also responsible for many other commercial items purchased annually by the federal government through other contractual mechanisms. For more than 35 years, the Coalition has brought together public and private sector

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[1] Pursuant to Rule 37.6, the *amicus* submitting this brief and their counsel hereby represent that neither the parties to this case nor their counsel authored this brief in whole or in part, and that no person other than *amicus* paid for or made a monetary contribution toward the preparation or submission of this brief. *Amicus* files this brief with the written consent of all parties, copies of which are on file in the Clerk's Office.

procurement leaders to work toward the mutual goal of common-sense acquisition.

The Coalition has a strong interest in the standards governing FCA litigation in general, and the "implied certification" theory of falsity in particular. The Coalition's members have successfully defended a significant number of FCA matters brought by both *qui tam* relators and the United States Department of Justice ("DOJ"), as well as FCA investigations conducted by DOJ and agency inspectors general. In many cases, either relators or DOJ invoked an "implied certification" theory to transform minor alleged infractions of contract or regulatory provisions—and even agency guidance or government forms—unrelated to contract performance into FCA violations, triggering the statute's "essentially punitive" regime of treble damages and penalties. See *Vt. Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 784-85 (2000). These alleged violations often amount, at most, to breach of contract claims for which the government has adequate remedies available. Whether the implied certification theory of legal falsity is valid, and whether the underlying statute, regulation, guidance, or contract term must specifically state that it is a condition of payment, are issues that have divided the federal courts for years. This Court's resolution of these issues will have a significant impact on the Coalition's members, regardless of the outcome.

INTRODUCTION AND SUMMARY OF ARGUMENT

When all you have is a hammer, everything looks like a nail. And few hammers are bigger than the FCA. Designed in part as fraud protection for the government when it engages in a consumer role, the FCA provides mandatory treble damages and monetary fines of $5,500 to $11,000 per instance when a government contractor makes a "false claim" against the government. Although the statute has a laudatory purpose, it also has the potential for abuse, particularly if falsity is defined broadly to include allegations of general contractual violations for which the government long has had other, more appropriate remedies. The hammer of the FCA also is wielded by private attorneys general known as *qui tam* relators. To these individuals (and their enterprising counsel) who "assist" the government in discovering fraud, every run-of-the-mill contract violation looks like a potential false claim. Because the potential adverse verdicts are enormous—sometimes in the "bet the company" category—these cases, if not dismissed, are often settled, regardless of merit (or the lack thereof), for substantial sums and rarely go to trial.

The "implied certification" theory of falsity at issue here provides relators and the government alike with even more incentive to wield the hammer. The theory allows FCA liability to be asserted against contractors who submit invoices for payment to the government for quality goods or services that are actually provided, but who allegedly have not complied

with minor contractual provisions unrelated to contract performance. See, e.g., *United States* v. *Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1269-70 (D.C. Cir. 2010) ("[W]ithout clear limits and careful application, the implied certification theory is prone to abuse by the government and *qui tam* relators who, seeking to take advantage of the FCA's generous remedial scheme, may attempt to turn the violation of minor contractual provisions into an FCA action.").

These results are not without real-world consequences. In government fiscal year 2015 alone, the government recovered over $3.5 billion under the FCA; $1.1 billion of those recoveries involved procurement matters. DOJ boasts total recoveries under the FCA from January 2009 to the end of fiscal year 2015 of $26.4 billion.

Complicating this high-stakes regime is the complex regulatory landscape in which government contracting takes place. The myriad of statutes, regulations, and contract clauses that are included and incorporated by reference in procurement contracts can, like Medicare and Medicaid requirements, span hundreds if not thousands of pages. See *United States* v. *Sanford-Brown, Ltd.*, 788 F.3d 696, 711 (7th Cir. 2015) ("[I]t would be equally unreasonable for us to hold that an institution's continued compliance with the thousands of pages of federal statutes and regulations incorporated by reference into the [Program Participant Agreement] are conditions of payment for purposes of liability under the FCA.").

Under the First Circuit's decision in the instant case, federal contractors potentially could be liable to the government under the FCA for even the most minor contractual infractions—even when the government receives the goods or services for which it bargained. Indeed, in some cases, a contractor could even be held liable under the implied certification theory for violating contractual provisions not included in the contract at all, but later determined by a court to address "a deeply ingrained strand of public procurement policy" under the so-called *Christian* doctrine. See *G. L. Christian & Assocs.* v. *United States*, 312 F.2d 418, 426 (Ct. Cl. 1963) (holding that such contract clauses are "incorporated, as a matter of law, into [the] contract"). Thus a claim submitted under such a contract could be found "false," potentially subjecting a contractor to liability under the FCA for violating a contract clause that is not even included in its contract, but that a court later determines should be read into the contract. That reality provides yet another reason for FCA defendants to settle rather than litigate even non-meritorious claims.

If government contractors are on the hook under the FCA for unintended "misrepresentations" stemming from requirements buried in a mountain of paperwork—not just the contracts themselves, but all the documents that those contracts incorporate by reference, along with any "deeply ingrained strands of procurement law" that courts decide to read into contracts—the costs of doing business with

the government increase dramatically. Assuming that all of the same players are even able to remain in the market, the overhead for increased compliance costs to mitigate these outsized risks will be transferred to the government—ultimately increasing prices to the government—that is, the taxpayers—and chilling the ability and desire of new contractors to enter the federal market.

It comes as little surprise, then, that courts consistently have held that violations of statutes, regulations, rules, or contractual provisions—without more—do not amount to a cause of action under the FCA. See, e.g., *United States ex rel. Steury* v. *Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010) ("The FCA is not a general 'enforcement device' for federal statutes, regulations, and contracts. Not every breach of a federal contract is an FCA problem." (citations omitted)); see also *United States ex rel. Joslin* v. *Cmty. Home Health of Md., Inc.*, 984 F. Supp. 374, 384 (D. Md. 1997) ("The FCA is not intended to operate as a stalking horse for enforcement of every statute, rule, or regulation." (citation omitted)). Yet, under the implied certification theory, zealous *qui tam* relators and their attorneys—highly motivated by financial bounties and attorneys' fees—can attempt to convert mere breaches of contractual or regulatory provisions into huge pay days by seeking to impose FCA liability on government contractors for such infractions. Not only does this threaten businesses and raise government procurement costs, it also supplants or nullifies the existing administrative

remedies available to the government for these infractions, as well as the exercise of reasoned discretion by government procurement officials.

That is why courts have rebuked these attempts, correctly holding that FCA liability based solely on a regulatory violation is an inappropriate expansion of the statute and could "short-circuit the very remedial process the [g]overnment has established to address non-compliance with those regulations." *United States ex rel. Wilkins* v. *United Health Grp., Inc.*, 659 F.3d 295, 310 (3d Cir. 2011); see also *United States ex rel. Rostholder* v. *Omnicare, Inc.*, 745 F.3d 694, 702 (4th Cir. 2014) ("Were we to accept relator's theory of liability based merely on a regulatory violation, we would sanction use of the FCA as a sweeping mechanism to promote regulatory compliance, rather than a set of statutes aimed at protecting the financial resources of the government from the consequences of fraudulent conduct.").

In addition to improperly expanding the scope of the FCA far beyond anything intended by Congress to address fraud on the government, the implied certification theory violates fair notice requirements that should be afforded government contractors and functionally removes the scienter requirement from the FCA. Because the implied certification theory is unnecessary to hold accountable those presenting true "false claims" against the government, this Court should refrain from considering the parameters of such a theory. The decision of the First Circuit

should be reversed and the implied certification theory rejected.

ARGUMENT

I. Implied Certification Would Significantly Drive Up Costs For Government Contractors—Ultimately To The Detriment Of The Government And The Taxpayers That Fund It.

Because all contractors who sell products and services to the government are subject to increased risk of liability under the implied certification theory, the cost increases that such a system would impose are extreme, unnecessary, and hence indefensible. Procurement contractors delivering goods and services to the federal government already are subject to a variety of requirements entirely unrelated to the goods and services that they provide. Imposing FCA liability for mere violations of these provisions—some of which are not even express in the contracts but subject to being read into them by courts after the fact—will unnecessarily increase costs to the government (i.e., the taxpayers) and drive contractors from the federal market.

The regulations and associated contract clauses imposed on procurement contractors include a virtual thicket of requirements—everything from enhanced labor obligations specific to government contractors to highly detailed cybersecurity standards that are both

evolving and increasingly hard to meet. Some of these requirements are incorporated by reference in contract documents, which can include, in turn, additional incorporated documents potentially resulting in hundreds or even thousands of pages containing hundreds of additional compliance provisions. Some of the requirements are a moving target. For example, the GSA MAS Schedule 70 (Information Technology) requires contractors selling computer products and services to the government not only to comply with certain initial, detailed standards published by the National Institute of Standards and Technology, but also to remain compliant as the agency changes these complex standards over time. And as explained above, in some cases, requirements may not be written in the contract at all, but deemed incorporated by operation of law after the fact under the *Christian* doctrine—further compounding the uncertainty, multiplying the risk of litigating even meritless lawsuits, and expanding the potential number of requirements that, if not fully met by the contractor, could support a finding of sweeping FCA liability under the implied certification theory embraced by the First Circuit below.

FCA punishment for garden-variety breaches of contract—where the government has received the goods or services for which it paid—expands FCA liability far beyond its original purpose: to punish knowing fraud against the government. Under the implied certification theory as applied by the First Circuit, *any* breach of contract—whether or not a

condition of payment, and whether or not any actual damages result—can render a claim "false" and serve as the basis for FCA liability and its extraordinary remedies. As a result, the pressure on government contractors to settle even meritless FCA lawsuits can only increase. The threat is not theoretical, but real. Last year, the government recovered approximately $3.6 billion in FCA settlements and judgments, increasing its total FCA recoveries since January 2009 to $26.4 billion. FCA defendants faced over 630 new lawsuits filed by *qui tam* relators. Establishing the implied certification theory applied by the First Circuit in this case as the nationwide standard will only accelerate this trend—no doubt leading contractors to evaluate whether it is in their best interest to remain in the government market. The inevitable result will be less competition—and higher prices—for government procurement customers.

This is especially true for commercial item contractors, including many of the Coalition's members, who provide goods and services that the federal government uses every day. A "commercial item" is defined in Federal Acquisition Regulation ("FAR") 2.101 as "an item * * * that is of a type customarily used by the general public or by non-governmental entities" as well as items that evolved from such items or include minor modifications to meet the government's needs. These are the same types of goods and services used by private industry—office supplies, tools, furniture, IT equipment and services, janitorial services and supplies, and the vast array of other products

and services used by all businesses. These items make up a significant amount of government expenditures—and the government has a strong preference for purchasing commercial items precisely *because* of the significant savings to the government that come from the ability to purchase, whenever possible, items already manufactured for public use. See Federal Acquisition Streamlining Act of 1994 ("FASA"), Pub. L. No. 103-355, 108 Stat. 3243 (1994) (codified in scattered sections of 41 U.S.C. and 10 U.S.C.).

Contractors who sell commercial items to the government already accept a significant number of regulatory burdens that add to their cost of doing business. For example, federal contractors generally are required to prepare annual affirmative action plans and file annual EEO-1 reports under Exec. Order No. 11,246; they generally must implement special policies and procedures relating to the hiring of former veterans and file VETS-100A reports in accordance with the Vietnam Era Veterans' Readjustment Assistance Act; they must meet certain domestic sourcing requirements; and, with certain exceptions, they must prepare subcontracting plans and implement policies and procedures to ensure they make a good faith effort to meet the goals set forth in the plans. Contractors providing services must comply with certain wage requirements such as the Davis-Bacon Act and the Service Contract Act.

In many cases, these commercial item contractors are small businesses that do not have the

internal resources available to evaluate and refine their internal compliance systems to counter the significant risk that any technical infraction could be exploited by a *qui tam* bounty hunter into costly *qui tam* litigation and overwhelming FCA penalties. It is difficult enough to try to stay ahead of the ever-increasing regulatory compliance burdens placed on government contractors—particularly for small-business contractors, which according to GSA's website make up 80 percent of GSA MAS contractors, and 36 percent of sales.[2] If the First Circuit's expansion of FCA liability through its application of the implied certification theory is permitted to stand, small businesses—which are already struggling to keep up with the onslaught of regulatory requirements—will bear the brunt of it, and will find it increasingly difficult to remain in the market.[3]

In the case of contractors who sell commercial items to the federal government through MAS

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[2] *For Vendors—Getting on Schedule*, GSA.GOV, http://www.gsa.gov/portal/content/198473 (last visited Jan. 18, 2016).

[3] For example, in the past two years alone, a significant number of Executive Orders either have been or are in the process of being added to the FAR, including three significant Executive Orders relating to labor: 1) Exec. Order No. 13,658, 48 C.F.R. §§ 52.222-55 (2014) (FAR 52.222-55), establishing a minimum wage for federal contractors; 2) Exec. Order No. 13,673, 79 Fed. Reg. 45,309 (July 31, 2014) (Fair Pay & Safe Workplaces), which requires contractors to collect and report information relating to certain labor law violations; and 3) Exec. Order No. 13,706, 80 Fed. Reg. 54,697 (Sept. 7, 2015), requiring a minimum number of days of paid sick leave for federal workers.

contracts, the contracts are automatically modified through mandatory mass modifications issued by the government. MAS contractors must accept these mass modifications if they wish to continue their contracts long-term. For example, Modification A403 to GSA MAS Schedule 70 contracts (Refresh 34), dated January 5, 2015, added FAR 52.222-55 that implement Exec. Order No. 13,658 establishing a minimum wage for federal contractors. Some of these requirements take time to implement, leaving contractors at risk of noncompliance for at least some period of time. Under the implied certification theory, the risk of noncompliance with constantly changing requirements can only increase—leading necessarily to substantially increased costs that will necessarily be passed along to the government (and ultimately to the taxpayer). The First Circuit once understood that reality. See *United States* v. *Data Translation, Inc.*, 984 F.2d 1256, 1262 (1st Cir. 1992) (Breyer, then-J.) (explaining that "significantly increasing competitive firms' cost of doing federal government business[] could result in the government's being charged higher * * * prices").

What is more, the substantial risks and costs imposed by an implied certification regime are entirely unnecessary, because an existing regulatory framework already provides adequate remedies when government contractors are found to be in noncompliance with contractual requirements. The Contract Disputes Act ("CDA"), 41 U.S.C. §§ 7101 *et seq.*, sets forth a comprehensive system for resolving disputes

between a government contractor and a procuring agency relating to the performance of procurement contracts. The CDA and its related regulations in the FAR initially require that the parties attempt to resolve disputes using administrative remedies. Only when administrative remedies are exhausted may the parties seek judicial review, and then only in the Court of Federal Claims or the applicable Board of Contract Appeals. Further appeals are heard by the Federal Circuit.

In addition, serious allegations of contract noncompliance, among other things, may be referred within the government to an agency inspector general or the agency suspension and debarment official ("SDO"). Agency inspectors general may also engage DOJ as appropriate should they believe the conduct at issue rises to the level of fraud under the FCA. Agency inspectors general (or even contracting officers) may also refer matters to the SDO for review if they have concerns regarding a contractor's responsibility. And FAR 9.406-2 identifies as reasons for debarment various noncompliances with contract terms and conditions.

Courts have correctly held that the appropriate way for the government to address noncompliance with contractual requirements is through this established regulatory scheme. See, e.g., *Sanford-Brown*, 788 F.3d at 712 (holding that "the agency's regulations have at all times provided—and continue to provide—a governmental enforcement mechanism in the form of an administrative proceeding before the

subsidizing agency, whereby any evidence of violations of conditions of participation may be considered and adjudicated"); *Omnicare*, 745 F.3d at 702 ("When an agency has broad powers to enforce its own regulations, as the FDA does in this case, allowing FCA liability based on regulatory noncompliance could short-circuit the very remedial process the [g]overnment has established to address non-compliance with those regulations." (quoting *United Health Grp.*, 659 F.3d at 310)).

Yet under an implied certification regime, that orderly system of dispute resolution would likely be supplanted by wild-west litigation brought by *qui tam* relators in courts across the country. The increased litigation costs would no doubt result in those increases being passed along to the government on the goods and services it purchases, whether directly by contractors anticipating litigation or indirectly through businesses leaving the market. That is yet another reason to reject the implied certification theory.

II. Implied Certification Functionally Eliminates The FCA's Scienter Requirement And Allows Liability To Be Imposed Without Fair Notice.

In addition to the concerns detailed above, an implied certification regime would functionally eliminate the FCA's scienter requirement and attach

liability without fair notice.[4] The implied certification theory essentially (and impermissibly) conflates the FCA's falsity element with the materiality and scienter elements—and should be rejected for that reason, too. This is particularly true given the potentially enormous ramifications of an FCA lawsuit, including treble damages, staggering penalties, potential suspension and debarment from government contracting, damage to business reputation, and the costs associated with time and resources necessary to defend FCA lawsuits. JOHN T. BOESE, CIVIL FALSE CLAIMS AND *QUI TAM* ACTIONS § 2.03[G][1][a], at 2-191 (4th ed. Supp. II 2015) ("[A]llowing liability to be imposed because of false implied certifications has the practical effect of eliminating the government's burden of proving that a defendant knowingly submitted a false claim to the government.").

The First Circuit's reading of "false" to include implied certifications also makes the FCA a trap for unsuspecting government contractors, who can find themselves embroiled in FCA litigation alleging that the contractor has committed fraud because of some failure to comply with a statutory, regulatory, or contractual provision, whether specifically stated in the

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[4] Because of these concerns, *amicus curiae* agrees with petitioner that "[i]f the implied-certification theory is to be adopted at all, its application is appropriately limited to circumstances in which a contractor has violated a statutory, regulatory, or contractual provision that is expressly designated as a precondition to payment." Pet. Br. 24.

contract or incorporated by reference. "[A] system that lays down a literal rule with which compliance is inordinately difficult, turning nearly everyone into a rule violator * * * is obviously undesirable." *Data Translation*, 984 F.2d at 1262 (Breyer, then-J.). To read the term "false" in the FCA so broadly as to include "implied certifications" would leave contractors not knowing what "false" really means or what they should do, depriving them of fair notice of what really constitutes a "false" claim. Contractors should not be subject to post-hoc justifications or after-the-fact insistence on the materiality of a statute, regulation, or contractual provision by the government or a *qui tam* relator, such that noncompliance constitutes a "false" claim that could result in FCA liability. See Pet. Br. 45-49.

In government contracting, the government and the contractor establish their mutual understanding as to the risks associated with noncompliance at the outset. And the prerequisite seeks to maintain a "crucial distinction" between punitive FCA liability and ordinary breaches of contract. *United States* v. *Southland Mgmt. Corp.*, 326 F.3d 669, 680 (5th Cir. 2003) (en banc) (Jones, J., specially concurring). Thus there is no justification for imposing FCA liability for what was meant to be resolved under contract law. And there is no reason that true fraud cannot still be exposed absent an implied certification theory. This is especially true when such a theory exposes contractors to punishing liability without fair notice.

CONCLUSION

For the foregoing reasons, the judgment of the First Circuit should be reversed.

Respectfully submitted,

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